179

Supreme Court, U.S.
FILED

No. 10-911 JAN 10 2011

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, and VERIZON COMMUNICATIONS, INC.,

Cross-Petitioners,

v.

CYNTHIA YOUNG, on behalf of herself and all others similarly situated,

Cross Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Paul D. Clement
Daryl L. Joseffer
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

Jeffrey G. Huvelle
Counsel of Record
John M. Vine
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
jhuvelle@cov.com

Counsel for Cross-Petitioners

January 10, 2011

QUESTION PRESENTED

Does a plan committee with broad discretionary authority to "interpret the plan and to decide all matters arising thereunder" abuse its discretion by correcting a scrivener's error in a plan document in connection with the claims review process?

PARTIES TO THE PROCEEDING

Cross-petitioners are Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications, Inc. Cross-respondents are Cynthia Young and a class of persons who participated in Verizon's Bell Atlantic Cash Balance Plan as of December 31, 1995.

CORPORATE DISCLOSURE STATEMENT

Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications, Inc. have no parent company. There is no publicly held company that owns 10 percent or more of their stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION 6

ERISA ALLOWS A PLAN TO AUTHORIZE THE PLAN ADMINISTRATOR TO CORRECT DRAFTING MISTAKES IN A FORMAL PLAN DOCUMENT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Curtis-Wright Corp. v. Schoonejongen,
514 U.S. 73 (1995) 8

Conkright v. Frommert,
130 S. Ct. 1640 (2010) 8, 9, 10

Dandridge v. Williams,
397 U.S. 471 (1970) 7

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 8

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009) 10

Metro. Life Ins. Co. v. Glenn,
554 U.S. 105 (2008) 8

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 7

Young v. Verizon's Bell Atl. Cash Balance Plan,
615 F.3d 808 (7th Cir. 2010) 1
667 F. Supp. 2d 850 (N.D. Ill. 2009) 1
575 F. Supp. 2d 892 (N.D. Ill. 2008) 1

STATUTES

28 U.S.C. § 1254 2

Employee Retirement Income Security Act ("ERISA")
§ 402, 29 U.S.C. § 1102 8
§ 404, 29 U.S.C. § 1104 8
§ 502, 29 U.S.C. § 1132 3

REGULATIONS

29 C.F.R. § 2560.503-1 9

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioners Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications Inc. respectfully file this cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. The Court should deny the petition for a writ of certiorari in No. 10-765 and, if the Court does so, it should also deny this cross-petition. If the Court grants that petition, however, it should also grant this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals is published at 615 F.3d 808 (7th Cir. 2010). Pet. App. 1a-28a.[1] The opinion of the district court reversing Verizon's administrative decision is published at 575 F. Supp. 2d 892 (N.D. Ill. 2008). Pet. App. 144a-90a. The opinion of the district court granting reformation is published at 667 F. Supp. 2d 850 (N.D. Ill. 2009). Pet. App. 29a-143a.

JURISDICTION

The court of appeals issued its opinion on August 10, 2010. It denied a motion for rehearing and rehearing en banc on September 8, 2010. Pet. App. 191a-92a. This Court docketed the petition for a writ

---

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari in No. 10-765.

of certiorari on December 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Seven months after Bell Atlantic changed the benefit formula under its pension plan to a cash balance formula, it adopted a formal plan document that contained a significant mistake. It is undisputed that the mistake was a scrivener's error. The plan committee exercised its discretionary authority to interpret the plan to correct the scrivener's error. The district court rejected that interpretation as exceeding the plan committee's authority. Nonetheless, the district court ruled in favor of cross-petitioners on their counterclaim for reformation, finding by clear and convincing objective evidence that the second reference in a plan provision to a transition factor was a scrivener's error that was inconsistent with participants' expectations regarding their pension benefits. The court of appeals affirmed the district court's reformation ruling without separately addressing the plan committee's authority to correct the scrivener's error in the first instance.

This cross-petition raises what is, in essence, an alternative basis on which this Court could reject cross-respondents' claim for additional benefits. Because the relevant plan documents gave the plan administrator broad discretionary authority to "interpret the Plan and to decide all matters arising thereunder," the lower courts could and should have deferred to the reasonable decision of the plan administrator to deny cross-respondents' claim for

additional benefits based on the scrivener's error. If the lower courts had done so, there would have been no need to undertake the lengthy litigation of the reformation counterclaim.

As explained in the brief in opposition in No. 10-765, true scrivener's errors are rare, and the reformation issue addressed by the court of appeals clearly does not merit this Court's review. It is equally clear, however, that nothing in ERISA precludes the plan administrator in the claims review process -- in addition to the courts through the reformation process -- from remedying an obvious and consequential scrivener's error. In the unlikely event the Court grants the petition in No. 10-765, it should also grant this cross-petition to ensure that there is no obstacle to this Court considering both methods of correcting a scrivener's error.

1. Cross-petitioners' opposition to the petition for a writ of certiorari in No. 10-765 contains a detailed statement of facts, which will not be repeated in full here. Briefly stated, cross-respondent filed suit in December 2005 and moved to amend the complaint in July 2006 to add a claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), based on a duplicative reference to a transition factor in a formula for calculating benefits. The district court stayed all proceedings to permit the plan administrator to consider cross-respondent's administrative claim. The plan administrator issued its decision on December 8, 2006, denying the claim. Pet. App. 155a-57a. In connection with its review and denial of cross-respondent's claim for benefits,

the plan administrator compiled a record consisting of 15,000 pages of documents.

The plan administrator determined that the duplicative reference to a transition factor in the 1996 formal plan document, which was carried over to the 1997 restatement of that document, was a mistake. It based this conclusion on multiple facts, including the fact that the plan amendment recommended by the Bell Atlantic Corporate Employees' Benefits Committee and approved by the Human Resources Committee of the Bell Atlantic Board of Directors called for multiplying a base amount by the transition factor only once, not twice. The plan administrator in 2006 also found that all employee communications regarding the new plan and all notices to employees advising them of the amount of their benefits called for a single multiplication by the transition factor. The plan administrator looked at the formal plan document itself and concluded that, if the intent had been to multiply the transition factor twice, it would have been more "natural" to revise the table of transition factors, rather than to multiply by each factor twice, and that all of the other plan provisions calling for multiplication by a transition factor provided for a single multiplication. Pet. App. 155a-57a.

Cross-respondent filed an administrative appeal of the decision. On April 2, 2007 the Verizon Claims Review Committee denied the appeal. Pet. App. 157a-59a. The committee did so on the basis of other plan documents and participant communications, both of which referred to only a single multiplication. The committee also looked at

the structure of the plan as a whole and noted that the second multiplication would entitle cross-respondent to receive benefits exceeding the benefits of similarly situated participants who were older and had more service, as well as benefits far larger than what cross-respondent would have earned under the prior plan formula.

The district court reviewed the committee's decision on the basis of the administrative record, which included more than 15,000 pages of documents. The court agreed with cross-respondent's contention that "the language regarding the second reference to the transition factor is not ambiguous" (Pet. App. 175a-76a); ruled that "[b]ecause the Committee found this language to be a mistake, it should have treated it as such, rather than as an ambiguity subject to interpretation by means of extrinsic evidence" (Pet. App. 176a-79a); and held that the correction of a mistake is a matter "more appropriately reserved for decision by the court." Pet. App. 187a. Addressing the issue *de novo*, the district court subsequently ruled that cross-petitioners had established by clear and convincing objective evidence the plan should be reformed to correct the mistake. Pet. App. 126a-27a.

Based on those rulings, the district court entered final judgment in favor of cross-respondents to the extent that they argued that the plan administrator erred by denying benefits under the plan as written. But the court also entered final judgment in favor of cross-petitioners on their counterclaim for reformation, and therefore ordered that the class members were "not entitled to any additional Plan

benefit distributions by reason of this litigation." Pet. App. 141a-42a.

2. Cross-respondents appealed, and cross-petitioners cross-appealed the district court's judgment concerning the plan administrator's exercise of discretion under the plan as written. The court of appeals affirmed the district court's reformation ruling without addressing the cross-appeal. Cross-respondents thus obtained no additional benefits. Pet. App. 18a, 22a-23a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

ERISA Allows A Plan To Authorize The Plan Administrator To Correct Drafting Mistakes In A Formal Plan Document.

The petition in No. 10-765 asks the Court to consider the standards that courts should apply in addressing, *de novo*, scrivener's errors in ERISA plan documents. That issue does not merit this Court's review. Nonetheless, one thing is clear: ERISA does not foreclose correction of an egregious scrivener's error. Not only do the courts possess the power of reformation, as exercised below, a plan administrator with broad discretion to interpret the plan also possesses the power to correct such errors in the first instance. Thus, in the unlikely event the Court grants plenary review to consider the correction of scrivener's errors in ERISA plans, it should also grant this cross-petition so that there will not be any procedural obstacle to the Court's full consideration of all potential methods of correcting such errors.

1. Because this cross-petition raises an alternative ground for the same relief (denial of additional benefits based on the scrivener's error), it is possible that the Court could reach this alternative ground without granting this cross-petition. Ordinarily, a respondent is free to raise alternative grounds without filing a cross-petition. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

In this case, however, the district court proceedings were structured such that the district court first declined to defer to the plan committee's correction of the scrivener's error, later allowed reformation pursuant to a counterclaim, and specifically entered judgment against cross-petitioners on the first of those issues (even though the court's judgment ultimately entered the relief that cross-petitioners requested—that cross-respondents take nothing). *See* pp. 6-7, *supra*. Thus, affirming the result below on the alternative ground that the plan committee had authority to correct the error might arguably be understood to enlarge the judgment below, which would necessitate a cross-appeal. *See generally Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Cross-petitioners have filed this cross-petition out of an abundance of caution, just as they filed a cross-appeal below.

2. While true scrivener's errors are rare, plan administrators, as well as courts, should have authority to correct them.

ERISA requires a plan to be maintained pursuant to written instruments and to specify the basis on

which payments are made to and from the plan. *See* ERISA § 402(a)(1), (b)(4), 29 U.S.C. § 1102(a)(1), (b)(4). ERISA also requires plan fiduciaries to discharge their duties under the plan in accordance with the documents and instruments governing the plan to the extent that the documents and instruments are consistent with ERISA. *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82 (1995).

Like all other kinds of documents, however, plan documents do not always speak for themselves. Thus, this Court has ruled that if the terms of the plan give the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, the courts should defer to the administrator's or fiduciary's decision as long as that decision is reasonable. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Indeed, where, as here, the terms of the plan grant discretionary authority to the plan administrator, a deferential standard of review remains appropriate even in the face of a conflict of interest. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *see also Conkright v. Frommert*, 130 S. Ct. 1640 (2010) (ruling that there was no reason to deny deference to an administrator's second interpretation of the plan simply because the administrator had made an honest mistake in its prior interpretation of the plan).

The Court's decisions in *Firestone* and its progeny do not suggest that a plan administrator's interpretation of a plan is entitled to deference only

if the interpretive issue arises for a reason other than a drafting error. Nor is there any reason to cabin plan administrators' authority in that manner. "Deference [to plan administrators] promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation." *Conkright*, 130 S. Ct. at 1649.

That rationale for deference applies with full force to drafting errors, especially considering that the plan administrator is in the best position to determine whether a plan provision contains an error and whether the participants had reasonable expectations based on that error. The claims review process also provides numerous participant safeguards, including two levels of administrative review, full access to all documents considered by the plan administrator in connection with the review, and judicial review of the plan administrator's decision. *See* 29 C.F.R. § 2560.503-1. Deference to administrators' efficient resolution of disputes -- as opposed to requiring plan administrators seek reformation by initiating expensive class action litigation against plan participants -- therefore furthers ERISA's objectives of substantial participant protections while avoiding the imposition of "administrative costs, or litigation expenses" on plans that "unduly discourage employers from offering plans in the first place." *Conkright*, 130 S. Ct. at 1649 (citing cases).

In this case, the plan gave broad "discretionary power" to the plan committee "to interpret the Plan and to decide all matters arising thereunder,

including the right to remedy possible ambiguities, inconsistencies, and omissions," and it did not limit the sources that the committee could consult in doing so. That broad grant of discretionary power includes authority to address scrivener's errors. *Cf. Conkright*, 130 S. Ct. at 1647 ("Nothing in that provision suggests that the grant of authority [to construe the Plan] is limited to first efforts to construe the Plan.").[2]

3. Ordinarily, the question presented in this cross-petition would not warrant this Court's review because obvious and consequential scrivener's errors are rare and there is no circuit split either on the question presented in this cross-petition or on reformation of ERISA plans, as explained in the brief in opposition in No. 10-765. But if this Court grants the petition in No. 10-765 to consider whether and how ERISA permits the correction of scrivener's errors, it should grant this cross-petition to ensure

---

[2] This Court's decision in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009), is hardly to the contrary. *Kennedy* emphasizes the importance of the text of a plan's governing documents. But *Kennedy* does not require, for example, that documents outside of the plan's governing documents be disregarded in administering a plan, in resolving ambiguities in a plan's governing documents, in deciding whether a plan contains a drafting error, or in deciding how to correct a drafting error. Indeed, the Court's ruling in *Kennedy* strongly suggests that unless the plan explicitly forbids it, plan administrators are permitted, in their discretion, to consult relevant outside documents in resolving such issues. *Id.* at 877-78.

that there are no procedural obstacles to considering one of the two obvious alternatives for correcting these rare errors.

CONCLUSION

If the Court grants the petition for a writ of certiorari in No. 10-765, it should also grant this cross-petition for a writ of certiorari.

Respectfully submitted,

Paul D. Clement
Daryl L. Joseffer
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

Jeffrey G. Huvelle
Counsel of Record
John M. Vine
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
jhuvelle@cov.com

Counsel for Cross-Petitioners

January 10, 2011

184

No. 10-911

Supreme Court, U.S.
FILED
MAR 18 2011
OFFICE OF THE CLERK

In the
Supreme Court of the United States

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN
and VERIZON COMMUNICATIONS, INC.,
Cross-Petitioners,

v.

CYNTHIA YOUNG, individually and on behalf of
all others similarly situated,
Cross-Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

ALLEN C. ENGERMAN
LAW OFFICES OF ALLEN C.
ENGERMAN, P.A.
SANCTUARY CENTRE
4800 NORTH FEDERAL HIGHWAY
SUITE 100-D
BOCA RATON, FLORIDA 33431
(561) 392-2222

JEFFREY C. ENGERMAN
LAW OFFICES OF JEFFREY C.
ENGERMAN, PC
11901 SANTA MONICA BLVD. # 700
LOS ANGELES, CALIFORNIA 90025
(310) 207-7777

MATTHEW T. HEFFNER
Counsel of Record
ARTHUR T. SUSMAN
MATTHEW T. HURST
GLENN L. HARA
SUSMAN HEFFNER & HURST LLP
TWO FIRST NATIONAL PLAZA
SUITE 600
CHICAGO, ILLINOIS 60603
(312) 346-3466
mheffner@shhllp.com

Attorneys for
Cross-Respondents

March 18, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Does a conflicted ERISA plan administrator with authority to interpret a plan have the power to unilaterally and retroactively change the plan's language to conform to the plan sponsor's intent?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE CROSS-PETITION 3

I. There is no circuit split regarding the question presented in Verizon's cross-petition. 3

II. Even if ERISA allowed a plan to authorize a plan administrator to reform plan terms without court intervention, the Plan here did not authorize Verizon to do so. 6

III. Verizon's cross-petition highlights the importance of Plaintiffs' petition. 8

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Audio Fidelity Corp. v. PBGC,
624 F.2d 513 (4th Cir. 1980) 2

Bergt v. Ret. Plan for Pilots Employed by Markair, Inc.,
293 F.3d 1139 (9th Cir. 2002) 12

Blackshear v. Reliance Standard Life,
509 F.3d 634 (4th Cir. 2007) 3-8

Chiles v. Ceridian Corp.,
95 F.3d 1505 (10th Cir. 1996) 12

Cozzie v. Metro. Life Ins. Co.,
140 F.3d 1104 (7th Cir. 1998) 7

Cross v. Bragg,
329 Fed. Appx. 443 (4th Cir. 2009) 3

Curtiss-Wright Corp. v. Schoonejongen,
514 U.S. 73 (1995) 12

Edwards v. State Farm Mut. Auto. Ins. Co.,
851 F.2d 134 (6th Cir. 1988) 12

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 4

Hansen v. Cont'l Ins. Co.,
940 F.2d 971 (5th Cir. 1991) 12

Heidgerd v. Olin Corp.,
906 F.2d 903 (2d Cir. 1990) 12

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 10

Int'l Union v. Murata N. Am. Inc.,
980 F.2d 889 (3d Cir. 1992) 2

Kennedy v. Plan Adm'r for DuPont Savs. & Inv. Plan,
129 S. Ct. 865 (2009) 5, 6, 11

McKnight v. S. Life & Health Ins. Co.,
758 F.2d 1566 (11th Cir. 1985) 12

Metro. Life Ins. Co. v. Glenn,
554 U.S. 105 (2008) 6

Peacock v. Thomas,
516 U.S. 349 (1996) 5

Stanford v. Foamex L.P.,
No. 07-4225, 2010 WL 3488651 (E.D. Pa. Aug. 31, 2010) 2

Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.,
549 U.S. 443 (2007) 8

Wilson v. Moog Auto., Inc. Pension Plan,
193 F.3d 1004 (8th Cir. 1999) 2

Statutes

15 U.S.C. § 77k 11

29 U.S.C. § 1104(a)(1)(D) 4

29 U.S.C. § 1132(a)(1)(B)
ERISA § 502(a)(1)(B) 11

29 U.S.C. § 1132(a)(3)(B)(i)–(ii),
ERISA § 502(a)(3)(B)(i)–(ii) 5, 12

Other Authorities

Stanley D. Baum, *The Big Dent in ERISA's Written Plan Requirement—Young v. Verizon's Bell Atlantic Cash Balance Plan*, BNA Pension & Benefits Daily (Nov. 5, 2010) 9

H.R. Rep. No. 93-807, *reprinted in* 1974 U.S.C.C.A.N. 4670 5

Craig C. Martin & William L. Scogland, *Attempting to Undo the Scrivener's Error in* Young v. Verizon's Bell Atlantic Cash Balance Plan, 34 Emp. Relations L.J. No. 4 (Spring 2009) 9

27 Williston on Contracts § 70:17 4

STATEMENT OF THE CASE

Verizon's cross-petition does not raise an issue worthy of this Court's review. True, it does suggest another possible answer to the exceptionally important question of federal law underlying Plaintiffs' petition: How should the federal courts handle negligently drafted ERISA plans that promise benefits not intended by the employers who adopt them?

But Verizon's proposed solution—allowing conflicted plan administrators to unilaterally rewrite plan terms they contend are "mistaken" and then requiring federal courts to defer to those decisions—is not a reasonable alternative. That idea has been rejected by every court to have considered the issue. It is contrary to the very structure of ERISA and the history of common-law reformation. And it was never adopted by Verizon in the Plan or argued to the Seventh Circuit as a proposed solution to this recurring and important question of federal law.

This Court, then, should grant Plaintiffs' petition on all three questions presented but deny Verizon's cross-petition.

Before proceeding to the law, Verizon's statement of the case makes two serious misstatements of fact. First, Verizon claims it "changed" the Plan's benefit formula seven months *before* it adopted the formal Plan document in July 1996. Cross-Pet. 2. The implication is that the Plan document was an after-the-fact formality, allowing the courts to disregard its written terms. While Verizon may have treated the Plan document as a mere formality, the district court held that the Plan's benefit formula was not changed

as a matter of law until the "official plan document" was "finalized" in July 1996 (although the change was "made retroactive to December 31, 1995"). App. 146a.[1] That was the right decision, and Verizon never appealed it.

Second, Verizon asserts that "[i]t is undisputed that the mistake was a scrivener's error." Cross-Pet. 2. But Plaintiffs have always disputed that. A scrivener's error is a particular type of drafting mistake. It occurs when two parties reach an agreement through negotiations, but subsequently mistakenly transcribe it. *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 518 (4th Cir. 1980). That is, it is a *mutual* mistake made by both parties. *Int'l Union v. Murata N. Am. Inc.*, 980 F.2d 889, 907 (3d Cir. 1992) (employer seeking reformation of alleged ERISA scrivener's error required to prove "that the mistake does not reflect the intent of the parties" through "history of collective bargaining negotiations"); *Wilson v. Moog Auto., Inc. Pension Plan*, 193 F.3d 1004, 1009 (8th Cir. 1999) (employer required to prove "the intent of the parties" through "negotiations between the Union and the Company").[2]

As Plaintiffs describe in detail in their petition at 20–23, Verizon clearly made a *unilateral* drafting mistake. But it never introduced any evidence at trial that any particular class member (let alone all 13,784

---

[1] "App." refers to the appendix to Plaintiffs' petition for writ of certiorari in No. 10-765.

[2] *But see Stanford v. Foamex L.P.*, No. 07-4225, 2010 WL 3488651, at *9 n.14 (E.D. Pa. Aug. 31, 2010) (finding circuit split on elements of ERISA scrivener's-error claim).

of them) negotiated, bargained for, or "agreed" to any formula other than what was clearly spelled out in the Plan document. *See Cross v. Bragg*, 329 Fed. Appx. 443, 445 (4th Cir. 2009) ("[I]gnorance of a mistake is insufficient proof of a party's intent to the contrary.").

REASONS FOR DENYING THE CROSS-PETITION

I. There is no circuit split regarding the question presented in Verizon's cross-petition.

The district court in this case relied heavily upon the Fourth Circuit's reasoning in *Blackshear v. Reliance Standard Life*, 509 F.3d 634, 642–43 (4th Cir. 2007), in finding Verizon did not have the power to unilaterally reform the Plan in the administrative process. App. 182–84. Yet Verizon chose not to discuss *Blackshear*—the only circuit court decision on point—in its cross-petition. Verizon does not even cite the case.

In *Blackshear*, the Fourth Circuit held,

> The doctrine of equitable reformation does not apply in the context of an administrator's interpretation of an ERISA plan; the administrator cannot simply "reform" a plan to correct what it unilaterally perceives to be a mistake or error contained in the plan's written terms. Rather, reformation, like other forms of equitable relief, must be requested by the party seeking to reform the contract and granted by a court.

509 F.3d at 642–43. In so doing, the Fourth Circuit reversed the district court for allowing a plan administrator to rewrite allegedly mistaken plan terms, even though an express "clerical-errors" clause in the plan document purported to authorize it. *Id.* at 641–42.

The reasoning for this holding is unimpeachable. Mistakes, under the common law of contracts, have "no legal effect" in and of themselves. *Id.* at 642 (citing 27 Williston on Contracts § 70:17). Rather, such mistakes will be "correct[ed]" only when equity so requires. *Id.* And making those equitable determinations and reforming (or "correcting" as Verizon calls it in its cross-petition) a contract is reserved for "a court in equity." *Id.*

The Fourth Circuit's holding is completely consistent with the common law and ERISA's purposes as well. A contracting party can never unilaterally decide a contract is mistaken, rewrite it, and expect a court to enforce the rewritten terms retroactively against the opposing party. *Id.* Similarly, under the common law of trusts, a trustee cannot unilaterally rewrite the terms of a trust as it sees fit—it must petition a court and seek reformation of the trust. App. 185a. Even if the trustee is merely "in doubt" regarding the terms of the trust, it must "obtain[] instructions from the court." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

ERISA is even stricter than the common law. It imposes a fiduciary duty on the plan administrator to act "in accordance with" the plan document insofar as it is consistent with ERISA. 29 U.S.C. § 1104(a)(1)(D). Accordingly, "to the extent [the plan administrator]

ignore[s] the unambiguous written terms of the plan and denie[s] benefits based on extrinsic evidence of the 'true intent' of the contracting parties, [the plan administrator] act[s] outside the scope of its discretion." *Blackshear*, 509 F.3d at 643. This requirement dovetails perfectly with ERISA § 502(a)(3)(B)(i)–(ii), which allows a plan administrator to seek equitable relief—including reformation—*only* to "redress" violations or "enforce" the terms of ERISA or an ERISA plan. 29 U.S.C. § 1132(a)(3)(B)(i)–(ii).[3]

So, in seeking the power to rewrite Plan terms unilaterally, Verizon is asking this Court to make the standards for reforming an ERISA-governed plan less stringent than an ordinary common-law contract or trust. Why would ERISA make it *easier* for an employer to reform a plan against its employees when the statute was passed specifically to *restrict* an employer's ability to renege on written promises? *See* H.R. Rep. No. 93-807, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4672.

Further, allowing plan administrators to rewrite plan terms unilaterally would violate ERISA's plan-documents rule by slowing benefit claims, creating uncertainty, and injecting "enquiries into nice expressions of intent" into the administrative process. *Kennedy v. Plan Adm'r for DuPont Savs. & Inv. Plan*, 129 S. Ct. 865, 875–76 (2009). Verizon argues that if

---

[3] As Plaintiffs have maintained at every stage of this litigation, the district court lacked subject-matter jurisdiction over Verizon's reformation claim because Verizon failed to "independently alleg[e] a violation of an ERISA provision or term of the plan," as required by § 502(a)(3)(B)(i)–(ii). *Peacock v. Thomas*, 516 U.S. 349, 354 (1996).

the district court had only reviewed its decision with deference, all the "administration costs, or litigation expenses" would have been avoided in this case, Cross-Pet. 9 & 10 n.2. But Verizon's own cross-petition admits that Verizon reviewed tens of thousands of pages of non-Plan documents to determine its own, decade-old intent, rather than follow the Plan. Cross-Pet. 5. That is precisely what the unanimous court in *Kennedy* prohibited. *Kennedy*, 129 S. Ct. at 876. That this complex inquiry took place in the administrative process does not ameliorate the conflict. *Id.*

Indeed, the idea that ERISA allows a conflicted plan administrator like Verizon to unilaterally rewrite promised plan terms due to its own intent-based and equitable determinations is absurd. The individual members of the Verizon Claims Review Unit and the Verizon Employee Benefits Committee who would be making these decisions are Verizon employees. App. 169a. They cannot be expected to hold their employer to heightened standards of proof or impartially make billion-dollar equitable determinations that might hurt their employer. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112–13 (2008).

II. Even if ERISA allowed a plan to authorize a plan administrator to reform plan terms without court intervention, the Plan here did not authorize Verizon to do so.

Some ERISA plan sponsors have tried to convey the power to decide scrivener's errors in the administrative process to themselves as plan administrators. *See, e.g.*, *Blackshear*, 509 F.3d at 638; Paul Hastings Client Alert, *Correcting Scrivener's Error—How Helpful Will Courts Be?*, http://www.

paulhastings.com/assets/publications/1448.pdf (last visited Mar. 17, 2011). But these clauses have been struck down. *See, e.g*, *Blackshear*, 509 F.3d at 643. Plaintiffs could not find a single case upholding such a clause, and Verizon has cited none.

Even if such clauses were allowed, the Plan at issue here does not contain one. Instead, the Plan limits the Plan administrator to "interpreting" the Plan document. Cross-Pet. 2. "Interpreting" a document is simply not synonymous with "rewriting," "reforming," or "correcting" a document. One action—interpretation —takes the words on a page and applies a reasonable meaning to them. The other—reformation or correction—does not apply a reasonable meaning to the words on a page; it eliminates those words and replaces them with others. *See Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104, 1108 (7th Cir. 1998) ("Interpretation and modification are different; the power to do the first does not imply the power to do the second.").

Perhaps because the Plan does not contain a scrivener's-error clause, Verizon chose not to argue the question presented in its cross-petition to the Seventh Circuit. Instead, it argued that the Plan was ambiguous and so it had the power to interpret the ambiguity. Thus, in its cross-appeal to the Seventh Circuit, Verizon framed the issue as whether it "reasonably denied plaintiff's transition factor claim where the Committee, *having identified both intrinsic and extrinsic ambiguity* created by the duplicative reference to the transition factor, interpreted the Plan to require plaintiff's opening balance to be calculated without regard to such duplicative reference." Verizon's Cross-Appeal, 2010 WL 2357583, at *2 (7th

Cir.) (emphasis added). It then spent six pages vainly arguing that the clear mathematical formula contained in Plan § 16.5.1(a)(2) was somehow ambiguous. *Id.* *49–55. But it never argued, in the alternative, that even if the Plan formula was unambiguous it could reform it without court intervention. *Id.*

So contrary to Verizon's assertion, Cross-Pet. 6, the Seventh Circuit *did* address Verizon's argument. It simply found the Plan unambiguous, App. 19a, which was the extent of Verizon's appeal on that subject. Consequently, the Court should reject the question presented in Verizon's cross-petition because it was not raised before the Seventh Circuit. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).

III. Verizon's cross-petition highlights the importance of Plaintiffs' petition.

The fact that ERISA attorneys are advising plan sponsors to adopt scrivener's-error clauses in plans (and that employers are heeding that advice, *see, e.g.*, *Blackshear*, 509 F.3d at 638) points out a significant problem in the world of pension plans. Verizon's request that this Court transmogrify the power to interpret ERISA plans into the power to equitably reform them merely highlights the problem.

First, it shows that drafting errors are more common than Verizon lets on. If drafting errors were as "rare" as Verizon asserts, Cross-Pet. 3, why are ERISA attorneys advising employers to adopt these provisions? And why, if the law is so settled in this area and the occurrences so rare, as Verizon argues,

are legal commentators so interested in this case?[4] Indeed, why are so many ERISA attorneys advising their clients that the law is *unsettled*?[5]

---

[4] *See, e.g.*, Stanley D. Baum, *The Big Dent in ERISA's Written Plan Requirement—Young v. Verizon's Bell Atlantic Cash Balance Plan*, BNA Pension & Benefits Daily (Nov. 5, 2010); Allison Frankel, *In the Case of the Billion-Dollar ERISA Typo, 7th Circuit Upholds Win for Verizon*, Law.com (Aug. 13, 2010), http://www.law.com/jsp/article.jsp?id=1202465836032&rss=newswire; Jonathan Stempel, *Verizon $1.67 Bln. Typo Can be Fixed—Court*, Reuters (Aug. 11, 2010); Robert Steyer, *Appellate Court Rules in Verizon's Favor in ERISA Case*, Pensions & Investments (Aug. 11, 2010), http://www.pionline.com/article/20100811/DAILYREG/100819967; Debra Cassens Weiss, *7th Circuit Allows Fix of In-House Lawyer's $1.67B Mistake*, ABA Journal (Aug. 11, 2010), http://www.abajournal.com/mobile/comments/7th_circuit_allows_fix_of_in-house_lawyers_1.67b_scriveners_error/; *Verizon Can Fix Pension Error, 7th Circuit Rules*, Courthouse News Service (Aug. 11, 2010), http://www.courthousenews.com/2010/08/11/29516.htm; Craig C. Martin & William L. Scogland, *Attempting to Undo the Scrivener's Error in* Young v. Verizon's Bell Atlantic Cash Balance Plan, 34 Emp. Relations L.J. No. 4 (Spring 2009).

[5] *See, e.g.*, Blank Rome LLP, Recent Developments in Employee Benefits & Executive Compensation (Oct. 2010), http://www.blankrome.com/siteFiles/Publications/00FFE0D1E47D51B82C4854C0EE08E80A.pdf (discussing circuit split between *Young* and "other jurisdictions such as the Fourth, Fifth, and Ninth Circuit [that] continue to prohibit retroactive correction of ERISA plan documents"); Robins, Kaplan, Miller & Ciresi LLP, Effect of Drafting Errors in ERISA Plans (Sept. 29, 2010), http://groups.rkmc.com/lawx/archive/2010/09/29/effect-of-drafting-errors-in-erisa-plans.aspx ("other courts have reached different conclusions" than Seventh Circuit); Katten Muchin Rosenman LLP Digest (Sept. 10, 2010), http://www.kattenlaw.com/files/Publication/2cb7c09a-52b5-4124-8865-02dfe237c1d9/Presentation/PublicationAttachment/bc9dbc19-3846-4340-b711-03180f347f55/Corporate_andFinancial_Weekly_Digest_

Clearly, there is considerable confusion among the courts, ERISA attorneys, and plan sponsors regarding how to deal with drafting errors in ERISA plan documents. It is well worth this Court's time to clarify that issue alone.

But there is a second, even more important issue at stake here. Why, exactly, are there so many errors in these ultra-important ERISA plan documents? After all, some plans, like the one at issue in this case, deal with billions of dollars in liabilities and the financial well-being of tens of thousands of employees. So why are plan sponsors not more careful in drafting them?

The Court should not assume that material drafting errors in ERISA plan documents are inevitable. That is not how federal courts deal with other important legal documents. For example, federal courts impose *strict liability* on companies like Verizon for material misstatements in registration statements made in conjunction with new securities issues. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 382

September_10_2010.pdf (advising that *Young* is "remarkable" because it conflicts with "case law in a number of the other federal circuits dealing with a plan sponsor's ability to unilaterally correct retroactively a drafting error" and is "contrary to the IRS's consistently stated opinion that employers may not unilaterally correct retroactively drafting errors in plan documents"); Greensfelder, Hemker & Gale, P.C., Employee Benefits & Executive Compensation Update (Fall 2010), http://www.greensfelder.com/article-detail-page.aspx?article=483 (advising that IRS and other courts do not allow "such relief for scrivener's errors"); Steptoe & Johnson, ERISA Advisory (Aug. 23, 2010), http://www.steptoe.com/publications-7122.html ("[n]ot every court has taken the same view" as Seventh Circuit, and it is unclear which view will "prevail[]").

(1983) (Section 11 of Securities Act of 1933 imposes "stringent standard" of liability that is "virtually absolute, even for innocent misstatements").

As a result, companies like Verizon hire teams of lawyers to scour every word of a registration statement to ensure its accuracy, completeness, and clarity. In stark contrast, in this case, Verizon set out to radically alter an ERISA plan dealing with $5 billion in liabilities and tens of thousands of employees' retirement incomes and left the job to one overworked, inexperienced in-house counsel. App. 23a. Not surprisingly, the resulting document was littered with egregious, fundamental inconsistencies and unintended provisions. *See* Pls.' Pet. Certiorari at 6.

Why not hold corporations to the same strict liability standard for both a securities registration statement and an ERISA plan and encourage the same degree of care in drafting the document? Because the language of Section 11 more explicitly calls for strict liability than ERISA § 502(a)(1)(B)? No. *Compare* 15 U.S.C. § 77k (purchaser may recover damages where registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a material fact") *with* 29 U.S.C. § 1132(a)(1)(B) (participant may recover benefits due "under the terms of" ERISA plan). Because investors rely more heavily on registration statements than ERISA plan participants do on plan documents? No. *See Kennedy v. Plan Adm'r for DuPont Savs. & Inv. Plan*, 129 S. Ct. 865, 875 (2009) ("ERISA's statutory scheme 'is built around reliance on the face of written plan documents.'").

In fact, since ERISA plan documents are all participants have to rely on, the federal courts should

"provide as strong an incentive as possible for employers" to draft them accurately. *Bergt v. Ret. Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002). The best incentive is a standard of strict liability for unambiguous ERISA benefits, as enforced by the majority of circuits. *Id.* (citing *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518–19 (10th Cir. 1996); *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 981–82 (5th Cir. 1991); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907–08 (2d Cir. 1990); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136–37 (6th Cir. 1988); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570–71 (11th Cir. 1985)).

But Verizon's proposed solution and the Seventh Circuit's liberal approach to reformation undermine this crucial public policy concern. Both solutions will lead to more careless plan drafting, more participant confusion, and less certainty in ERISA plans. *Contra Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (ERISA was designed to ensure that participants may, "*on examining the plan documents*, determine exactly what [their] rights and obligations are under the plan").

By accepting Plaintiffs' petition (and denying Verizon's), then, this Court can right the ship by putting plan sponsors on notice that ERISA plan documents are more than mere formalities. Unambiguous, fundamental promises in these documents should be strictly enforced, unless they clearly contradict other plan terms or ERISA, just as Congress intended. See 29 U.S.C. § 1132(a)(3)(B)(i)–(ii).

CONCLUSION

The Court should grant Plaintiffs' petition for a writ of certiorari in No. 10-765 and deny Verizon's conditional cross-petition in No. 10-911.

Respectfully Submitted,

Matthew T. Heffner
Counsel of Record
Arthur T. Susman
Matthew T. Hurst
Glenn L. Hara
Susman Heffner & Hurst LLP
Two First National Plaza
Suite 600
Chicago, Illinois 60603
(312) 346-3466
mheffner@shhllp.com

Allen C. Engerman
Law Offices of Allen C. Engerman, P.A.
Sanctuary Centre
4800 North Federal Highway
Suite 100-D
Boca Raton, Florida 33431
(561) 392-2222

Jeffrey C. Engerman
Law Offices of Jeffrey C. Engerman, PC
11901 Santa Monica Blvd. # 700
Los Angeles, California 90025
(310) 207-7777

Attorneys for Cross-Respondents

184

(2)

No. 10-911

Supreme Court
FILED
MAR 29 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, and VERIZON COMMUNICATIONS, INC.,

Cross-Petitioners,

v.

CYNTHIA YOUNG, individually and on behalf of all others similarly situated,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF CROSS-PETITIONERS

Paul D. Clement
Daryl L. Joseffer
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

Jeffrey G. Huvelle
Counsel of Record
John M. Vine
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
jhuvelle@cov.com

Counsel for Cross-Petitioners

March 29, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CROSS-PETITIONERS' REPLY BRIEF 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES

AT&T Corp. v. Hulteen,
129 S. Ct. 1962 (2009) 4

Bance v. Alaska Carpenters Ret. Plan,
829 F.2d 820 (9th Cir. 1987) 4

Blackshear v. Reliance Standard Life Ins. Co.,
509 F.3d 634 (4th Cir. 2007) 7

Conkright v. Frommert,
130 S. Ct. 1640 (2010) 4

Green v. Bock Laundry Mach. Co.,
490 U.S. 504 (1989) 5

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000) 6

Pub. Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) 5

Sorrells v. United States,
287 U.S. 435 (1932) 5

United States v. Rodgers,
466 U.S. 475 (1984) 5

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 5

Yee v. Escondido,
503 U.S. 519 (1992) 7

STATUTES

29 U.S.C. § 1001 4

CROSS-PETITIONERS' REPLY BRIEF

Verizon filed its conditional cross-petition for only one reason: to ensure that, in the unlikely event that the Court were to grant the petition, the Court would be in a position to consider all potential remedial options for addressing a scrivener's error in an ERISA plan document. Cross-respondents respond that the issue raised in the cross-petition is not independently certworthy. Verizon agrees. No issue raised in the petition or the conditional cross-petition merits this Court's review. True scrivener's errors are exceedingly rare and there is no meaningful split in the courts of appeals. But if this Court were to address the subject, there would be no reason for the Court to be artificially constrained in considering the various remedial options, including the possibility that a plan administrator could interpret a plan document to avoid the absurdities produced by the scrivener's error in much the same way that courts interpret statutes to eliminate such absurdities.

1. The brief in opposition accuses Verizon of "two serious misstatements of fact." Br. in Opp. 1-2. There were no misstatements. It is undisputed, as the conditional cross-petition stated, that the duplicative reference to a transition factor was a scrivener's error. Cross-Pet. 2. Cross-respondents do not dispute as a factual matter that the duplicative reference was an error and that the error was made by the scrivener. The Seventh Circuit aptly described the problem as "[b]otched reformatting," Pet. App. 20a, or "a drafting mistake," as cross-respondents acknowledged in their Seventh Circuit brief. Cross-Resp. 7th Cir. Br. 5.

Cross-respondents contend, however, that the legal doctrine of scrivener's errors requires that the mistake be mutual, and the mistaken reformatting here was a unilateral error. Br. in Opp. 2. It is not at all clear that the legal question depends on a mutual mistake. Scrivener's errors in the statutory context are recognized as such despite their unilateral character. Here, however, the district court found a mutual mistake in the relevant sense: "both the plan sponsor and the plan beneficiaries were operating under the same understanding of the sponsor's intent." Pet. App. 119a-20a. The district court found "by objective clear and convincing evidence that both parties operated under the understanding that [the transition factor] would only be multiplied once." Pet. App. 126a. The evidence included "more than 50,000 separate mailings" to participants, "each of which," the district court found, made clear the intended formula. Pet. App. 128a. The Seventh Circuit affirmed the district court's finding that, under the clear-and-convincing evidence standard, the duplicative reference was "a scrivener's error inconsistent with the plan participants' expected benefits" and reformation was therefore appropriate. Pet. App. 22a-23a.

Cross-respondents also claim that Verizon made a "serious misstatement of fact" by stating that Bell Atlantic had changed the plan formula seven months before it adopted the formal plan document in July 1996. Br. in Opp. 1. This argument is a straw man. There can be no dispute as to the sequence of events: the erroneous plan provision was adopted "after the fact," that is, after the intended formula had been communicated to employees in 50,000 separate

mailings and had been used to calculate the actual opening balances for all participants in accordance with the amendment approved by the Human Resources Committee of the Bell Atlantic Board of Directors, which called for multiplying by the transition factor only once, not twice. Pet. App. 46a-73a.

"The implication" to be drawn from Verizon's reliance on this sequence, according to cross-respondents, is that the plan document is "a mere formality." Br. in Opp. 1. Verizon never said that. Rather, the sequence is additional evidence that the duplicative reference in the formal plan text was "a scrivener's error inconsistent with the plan participants' expected benefits."[1] Pet. App. 22a.

2. On the merits, the brief in opposition frankly acknowledges that cross-respondents seek to impose a "strict liability" standard for errors in ERISA plans, under which there would *never* be a remedy for a scrivener's error—no matter how clear it is that the error was inconsistent with everyone's understanding of the sponsor's intent, and no matter how devastating the consequences. Br. in Opp. 12. That position has no basis in ERISA or common sense.

As this Court recently emphasized, "[p]eople make mistakes," especially when dealing with

---

[1] Contrary to cross-respondents' assertion, the district court did not hold that the formula was, as a matter of law, "not changed" until the plan document was finalized. Br. in Opp. 1-2.

"lengthy and complicated" ERISA plans. *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010). A strict liability standard would not eliminate those mistakes. True scrivener's errors are already rare, in part because plan administrators have plenty of incentives to try to avoid them—no one would choose to incur the costs and risks of litigation under the strict standards of the scrivener's error doctrine.

While a strict liability standard would not reduce true scrivener's errors, it would "unduly discourage employers from offering ERISA plans in the first place," contrary to Congress's intent. *Conkright*, 130 S. Ct. at 1649 (internal quotation marks omitted). Employees' justified expectations can be protected, *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009), and plans can be soundly funded, 29 U.S.C. § 1001(c), only if plans have predictable financial consequences. Strict liability for drafting errors, however, would lead to wholly unforeseen liabilities that would "create an actuarial and funding nightmare" for plan sponsors. *See Bance v. Alaska Carpenters Ret. Plan*, 829 F.2d 820, 825 (9th Cir. 1987).

Cross-respondents argue that the plan administrator may only interpret ambiguous plan provisions, and may not rewrite plan documents to correct clear mistakes. That is a false dichotomy. Correcting a scrivener's error is an exercise in interpreting—not rewriting—a plan provision to effectuate the drafter's intent. Thus, as the Seventh Circuit noted, there is "little difference between the intent-based inquiry that took place in this reformation case and what must occur in the related

case of an ambiguous ERISA plan." Pet. App. 19a. Indeed, like both the district court and the Seventh Circuit, the administrator of the Verizon plan concluded that the duplicative reference in a plan document to the plan's transition factor was a mistake and that both Bell Atlantic and the participants expected only a single multiplication by the transition factor. Pet. App. 155a-59a.

In the analogous context of construing statutes, this Court has repeatedly recognized that when the "plain language" of congressional legislation would lead to "absurd or glaringly unjust results," courts should construe statutes to avoid those results. *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quoting *Sorrells v. United States*, 287 U.S. 435, 450 (1932)); *see also, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528-29 (1989) (Scalia, J., concurring in the judgment). Correcting scrivener's errors is an interpretive exercise that "does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch" by presuming, as a matter of interpretation, that the statute's drafters "would not act in an absurd way." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment). Construing provisions in this manner does not amount to "rewriting the statute"; it entails only "correcting a technical mistake" so as to vindicate a "meaning genuinely intended but inadequately expressed." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting). Because the scrivener's error doctrine in this context is a means of *interpreting* a

provision, it falls within plan administrators' interpretive powers.

3. Apart from arguing the merits, cross-respondents offer three reasons for denying the cross-petition. None has merit.

First, cross-respondents assert that Verizon did not raise this issue before the Seventh Circuit. Br. in Opp. 8. Cross-respondents are wrong. The district court ruled that the plan administrator abused its discretion by denying benefits based on its finding that the duplicative reference to the transition factor was a mistake. Pet. App. 188a. Verizon challenged that ruling in the Seventh Circuit by filing a cross appeal, just as it is now raising the same issue in this Court by filing a conditional cross-petition.

Cross-respondents nonetheless contend, in effect, that Verizon is now invoking a different *supporting argument*. Specifically, cross-respondents argue that Verizon relied below on the plan administrator's discretion to interpret an ambiguous plan provision, and is now arguing that the plan administrator may remedy an obvious scrivener's error. As explained above, there is no meaningful difference between those two ways of arguing the point. But even if there were, that difference in supporting *arguments* would be irrelevant. The *issue* here is whether the plan administrator abused its discretion by not enforcing the scrivener's error. Verizon clearly preserved that issue, and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris*

Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

Second, cross-respondents argue that the Fourth Circuit held in *Blackshear v. Reliance Standard Life*, 509 F.3d 634, 642-43 (4th Cir. 2007), that the authority to reform ERISA plans lies exclusively with the courts, not the plan administrator. That single lower court decision hardly bears on the certworthiness of the conditional cross-petition, and the decision is wrong for the reasons explained above.

Third, cross-respondents contend that there is no circuit split on the issue raised by the cross-petition. As noted above, Verizon agrees that none of the issues presented here is independently certworthy; that is why it filed a *conditional* cross-petition for the sole purpose of removing any procedural obstacle to the Court's consideration of the role of the plan administrator with respect to scrivener's errors in the unlikely event the Court grants the petition. Nonetheless, scrivener's errors are rare, cases addressing them are rarer still, and there is no square circuit split that could warrant review of either the petition or the conditional cross-petition.

CONCLUSION

Review of the Seventh Circuit's decision is not warranted. But if the Court were to grant the petition in No. 10-765, it should also grant the conditional cross-petition so that the Court would face no procedural impediment to considering all of

the remedies for correcting a scrivener's error in an ERISA plan document.

Respectfully submitted,

Paul D. Clement
Daryl L. Joseffer
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

Jeffrey G. Huvelle
Counsel of Record
John M. Vine
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
jhuvelle@cov.com

Counsel for Cross-Petitioners

March 29, 2011